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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91174297
Party	Defendant FREELIFE INTERNATIONAL, LLC FREELIFE INTERNATIONAL, LLC 333 Quarry Road Milford, CT 06460
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Submission	Motion to Dismiss - Rule 12(b)
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Signature	/Heather L. Buchta/
Date	01/09/2007
Attachments	Motion to Dismiss for Lack of Standing.pdf (3 pages)(157475 bytes)

I hereby certify that this correspondence is being electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, on the date set forth below.

I hereby further certify that a copy of the foregoing Answer and Affirmative Defenses to Petition to Cancel is being deposited with the United States Postal Service on the date set forth below as first class mail in an envelop addressed to: John Arai Mitchell, 453 South Spring Street, Suite 930, Los Angeles, CA 90013, Attorney for Opposer.

Date of Signature and Deposit: January 9, 2007


Heather L. Buchta

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Brandstorm Inc.

Opposer,

v.

Opposition No. 91174297

Freelife International, LLC

Applicant.

**MOTION TO DISMISS FOR LACK OF STANDING AND
FAILURE TO STATE A CLAIM**

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 503, Applicant FreeLife International, LLC move the Trademark Trial and Appeal Board to dismiss the Notice of Opposition ("Notice") with prejudice. This Motion is supported by the attached Memorandum of Points and Authorities.

Defendant has appointed the law firm of Quarles & Brady LLP, and Heather L. Buchta, as its attorney to sign this Motion to Dismiss For Lack of Standing and Failure to State a Claim pursuant to C.F.R. 2.119(e) (37 U.S.C. §2.119(e)), to prosecute this Motion to Dismiss For Lack of Standing and Failure to State a Claim and to transact all business in the United States Patent and Trademark Office in connection therewith.

Respectfully submitted this 9th day of January, 2007.

QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, AZ 85004-2391

By: 
Heather L. Buchta

Attorneys for Applicant FreeLife International LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. OPPOSER LACKS SUFFICIENT STANDING TO BRING THE NOTICE BEFORE THIS BOARD

For Opposer's Notice to survive initial scrutiny before this Board, it must set forth facts alleging Opposer's standing to file the Notice sufficient to maintain the Notice. Section 13(a) of the Lanham Act, 15 U.S.C. § 1063(a), grants to "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register..." the right to file an opposition opposing the registration of the applied for mark. Because Opposer has failed to plead any facts in the Notice indicating it "would be damaged" by the registration of Applicant's mark as required by statute, Opposer's Notice must be dismissed.

A notice of opposition must, in part, allege facts showing why the opposer would be damaged by a registration. 37 C.F.R. § 2.104. The opposer must allege facts showing an interest in the mark, which interest would be damaged by registration of the mark at issue. *Mishawaka Rubber & Woolen Mfg. Co. v. Bradstone Rubber Co.*, 109 F.2d 219, 44 U.S.P.Q. 371 (C.C.P.A. 1940). *See also Ritchie v. Simpson*, 170 F.3d 1092, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999) (Elements necessary to assert an allegation of standing are (1) belief that opposer will suffer some kind of damages if mark is registered, (2) real interest in the proceedings, and (3) a reasonable basis for its belief of damage.) In the Notice however, Opposer has offered this Board no more than a summary of the law pertaining to the duties of the United States Patent and Trademark Office during examination (e.g., determination of descriptiveness and geographic descriptiveness). *See* Notice, ¶¶ 5-9. In addition to the fact that this Board is already keenly aware of these duties, the Examining Attorney has already discharged these duties in requiring disclaimers of certain material the Examining Attorney believes to be descriptive. *See* Examiner's Amendment, dated August 28, 2006, Serial Number 78-857,705.

The only paragraph in the Notice that purports to show any alleged damage to Opposer is Paragraph 10 of the Notice in which Opposer references certain correspondence between the parties in August of 2006, apparently attempting to allege that it will be damaged by a threat of litigation if Applicant's mark proceeds to registration. These allegations are insufficient to provide Opposer with standing for its Notice. It is well-settled law that the threat of or the existence of an infringement suit is insufficient damage under the law to provide standing sufficient to oppose registration of a mark. *See, e.g., Morton Foods, Inc. v. Frito Co.*, 314 F.2d

822, 137 U.S.P.Q. 58 (C.C.P.A. 1963); *Continental Specialties Corp. v. Continental Connector Corp.*, 192 U.S.P.Q. 449 (T.T.A.B. 1976). As a result, Opposer lacks standing to bring its Notice to the Board and, therefore, the Notice must be dismissed.

II. OPPOSER HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A notice of opposition also must allege facts stating specific grounds for the opposition. 37 C.F.R. § 2.104. Opposer has failed to state any specific grounds for its opposition and has merely provided this Board with an analysis of the law on descriptiveness, a summary of Applicant's previous applications to the United States Patent and Trademark Office and stating that the parties to this action exchanged correspondence almost six months ago. Without any grounds to support the Opposition, Opposer's Notice must be dismissed.

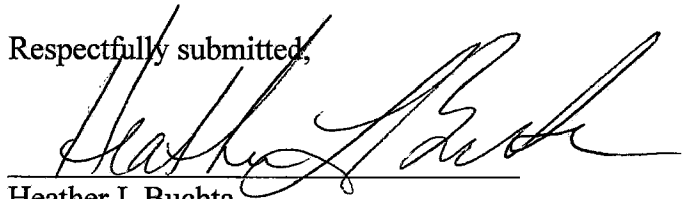
WHEREFORE, Applicant prays that this Opposition proceeding be dismissed with prejudice.

FEES

No fee is believed due with this submission; however, if a fee is due, please charge the fee to Deposit Account No. 17-0055.

Dated: January 9, 2007

Respectfully submitted,



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